Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

REPLY COMMENTS OF
OMNITEL COMMUNICATIONS, INC. AND TEKSTAR COMMUNICATIONS, INC.

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SUMMARY

OmniTel Communications, Inc ("OmniTel") and Tekstar Communications, Inc. ("Tekstar") are facilities-based rural competitive local exchange carriers ("CLECs"). OmniTel operates in smaller communities and less dense areas of Iowa, and Tekstar operates in similar areas in Minnesota. Their reply comments make the following points in addressing the issue of access stimulation and the related rules proposed by the Commission in the Notice of Proposed Rulemaking *("NPRM")*:

1. The Commission Should Confirm Stimulated Traffic Is Access Traffic.

The Commission should confirm that so-called access stimulated traffic is access traffic because: (1) it consists of calls placed by the customers of interexchange carriers ("IXCs") in different exchange areas than the conference bridge platforms that are served by the access lines of CLECs; and, (2) IXCs treat the traffic as toll traffic for all other purposes. Further, by proposing a solution to modify its access charges rules, the Commission is already effectively concluding that the termination of interstate interexchange traffic for IXCs by CLECs is switched access service and that the traffic is access traffic.

2. The Commission Has Adopted the Proper Trigger to Identify Stimulated Traffic.

The Commission proposed trigger for reducing switched access rates – the existence of a revenue-sharing agreement – is appropriate because it is tailored to the perceived source of the access stimulation concerns. The Commission should reject the imposition of additional or alternative triggers as arbitrary, unworkable, and burdensome.

3. The Commission Has Adopted the Proper Rates for CLECs Meeting the Trigger.

OmniTel and Tekstar, along with many other commenters, agree with the Commission that once the trigger is met, CLECs should benchmark their interstate switched access rates to the rates charged by the Bell Operating Company or largest incumbent local exchange carrier in the state. The Commission should reject the attempts of other commenters to use this proceeding to alter the overall intercarrier compensation regime for CLECs and seek substantially lower rates. Such proposals are not supported by evidence and would single out one form of toll traffic for special treatment at a time when the Commission is seeking to unify rates.

4. Revenue-Sharing Is Not Unlawful *Per Se*.

OmniTel and Tekstar like many other commenters recognize that revenue-sharing is a long standing practice in the industry and should not be found illegal.

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OmniTel Communications, Inc. ("OmniTel") and Tekstar Communications, Inc. ("Tekstar"), through their undersigned counsel, hereby respectfully submit their reply comments to the Federal Communications Commission ("Commission") in response to the Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.[1] OmniTel and Tekstar are rural competitive local exchange carriers ("CLECs"). These reply comments address the issues surrounding so-called access stimulation and the Commission's proposed access stimulation

[1] *Connect America Fund et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (released Feb. 9, 2011). ("*NPRM*")

rules in relation to CLECs. In general, OmniTel and Tekstar support the Commission's proposed rules.

I. INTRODUCTION

The comments filed on April 1, 2011 in response to the *NPRM* show broad support among regulators, interexchange carriers ("IXCs"), local exchange carriers ("LECs"), and conference calling providers for the Commission's proposal to address traffic stimulation.[2] The Iowa Utilities Board ("IUB") calls it a "viable solution."[3] The United States Telecom Association ("USTelecom") calls it "a major step forward,"[4] while CenturyLink says "a hybrid solution such as is proposed can provide a meaningful solution…"[5] IXCs like Verizon[6] and Level 3[7] also offer support. Further, conference call provider ZipDX is "supportive of the proposed rules…"[8] OmniTel and Tekstar believe the Commission's proposal is in the public interest, and, especially given its broad support, urge its adoption to eliminate continuing uncertainty.

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[2] *NPRM*, ¶¶ 658 et seq.

[3] Comments of IUB, WC Docket No. 10-90, et al., Apr. 1, 2011, at 2. ("IUB Comments")

[4] Comments of USTelecom, WC Docket No. 10-90, et al., Apr. 1, 2011, at 9. ("USTelecom Comments")

[5] Comments of CenturyLink, WC Docket No. 10-90, et al., Apr. 1, 2011, at 40. ("Comments of CenturyLink")

[6] Comments of Verizon and Verizon Wireless, WC Docket No. 10-90, et al., Apr. 1, 2011, at 34. ("Verizon Comments")

[7] Comments of Level 3 Communications, LLC, WC Docket No. 10-90, et al., Apr. 1, 2011, at 3. ("Level 3 Comments")

[8] Comments of ZipDX, WC Docket No. 10-90, et al., Apr. 1, 2011, at 4.

II. SUMMARY OF OMNITEL/TEKSTAR'S INITIAL COMMENTS

In their comments, OmniTel and Tekstar explained how the market has created incentives for carrier-negotiated agreements that address access stimulation concerns.[9] Absent such an agreement, however, a CLEC will not be paid today by an IXC if it experiences a substantial increase in volumes of interexchange traffic to terminate. While many IXCs have been willing to enter into agreements with CLECs, not all have, and Commission rules are required to remove any uncertainty.

OmniTel and Tekstar support the Commission's proposed rules because they are in the public interest and should reasonably eliminate any remaining concerns by IXCs about access stimulation. The Commission's solution would do this by putting rural CLECs that enter into revenue-sharing arrangements effectively on the same footing as a CLEC that provides services serving non-rural areas. From a policy perspective, the proposal is a sound adjustment of the Commission's benchmarking policy regarding CLEC access charges. Additionally, the proposal would eliminate doubt about the proper classification of the services provided by the affected CLECs and confer protections to ensure that CLECs are paid for the valuable services they provide to the IXCs.

III. THE COMMISSION SHOULD CONFIRM THAT THE TRAFFIC IS ACCESS TRAFFIC AND REJECT THE CLAIMS OF SEVERAL PARTIES THAT, AS A LEGAL OR REGULATORY MATTER, TRAFFIC TERMINATED TO CONFERENCE CALLING COMPANIES CANNOT BE SWITCHED ACCESS

Given the comments of some IXCs, OmniTel and Tekstar seize this opportunity to urge the Commission to make clear that high-volume access traffic terminated by LECs to conference calling providers is subject to interstate access charges. OmniTel and Tekstar note that absent

[9] Comments of OmniTel and Tekstar, WC Docket No. 10-90, et al., Apr. 1, 2011, at 7-12. ("OmniTel/Tekstar Comments")

such direction, IXCs may fashion new arguments to avoid paying for the traffic they deliver to CLECs for termination, despite the adoption of new rules by the Commission. In its comments, Sprint Nextel Corporation ("Sprint") offers a preview of arguments that traffic under revenue sharing arrangements is not "access traffic":

> "Although the Commission does not assert in the instant NPRM that pumped traffic is legitimate access traffic, its proposal to allow LECs to assess access charges … on pumped traffic may be interpreted – incorrectly – by some parties as an FCC seal of approval of traffic pumping activities. This surely and obviously is not the case."[10]

Sprint's argument misses the mark because, in fact, the traffic at issue is switched exchange access traffic.

The Act offers a clear and simple definition of "exchange access": ". . . the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[11] In addition, telephone toll service is service "between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[12] The traffic at issue in this proceeding is undoubtedly toll traffic: it consists of calls placed by the IXCs' interexchange customers in different exchange areas than the conference bridge platforms that are served by the access lines of CLECs like OmniTel and Tekstar. Moreover, the IXCs treat the traffic as toll traffic for all purposes other than paying terminating access charges. The calls are covered by the IXCs' long-distance calling plans; the IXCs have given no indication that they do not pay originating access on the calls; OmniTel and Tekstar believe that the IXCs exchange this traffic among themselves where they have applicable transiting or termination agreements; and, OmniTel and Tekstar

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10 Comments of Sprint, WC Docket No. 10-90, et al., Apr. 1, 2011, 11. ("Sprint Comments")

11 47 U.S.C. § 153(16).

12 47 U.S.C. § 153(48).

believe that the IXCs pay for universal service on the revenues received for this traffic which they treat as interstate interexchange telecommunications services revenues. With respect to the termination of these toll calls to their conference calling providers, Tekstar and OmniTel do so on their switching, transport, and other local exchange facilities. Consequently, the services are exchange access and, more particularly, switched exchange access.

Contrary to Sprint's contentions, the *NPRM* recognizes that the termination of interstate interexchange traffic for IXCs by CLECs is switched access service and that the traffic is access traffic.[13] If the *NPRM* did not intend to do so, the Commission would not propose to modify its access charge rules in a way that continues to accommodate compensation for such traffic through CLECs' access tariffs. There is no mechanism suggested in the *NPRM* or present in the law to change that categorization on the grounds that there might be a revenue-sharing arrangement between the CLEC and a third party. The statutory definitions cannot be ignored.

Since the "trigger" changes the interstate access rate that applies by establishing a new benchmarking mechanism, the Commission is reaffirming that access charges apply and that IXCs must pay them. Because the Commission rules would require CLECs to reflect these changes in their switched access tariffs, there can be no other conclusion than the Commission rules treat the traffic as switched access. In the end, the Commission has concluded that it makes no difference whether the call terminates to a conference call provider or a residential end user, the LEC uses its local exchange facilities to switch and transport the toll call to its termination point and thus provides switched access services for the IXCs for which the LEC is entitled to payment.

[13] *See e.g.*, *NPRM* ¶ 658 ("We therefore propose revisions to our interstate access rule …").

IV. IXCS FAIL TO OFFER WORKABLE SOLUTIONS TO THE PROPOSED TRIGGER THAT REDUCES THE SWITCHED ACCESS RATES

One benefit of the Commission's proposal is its tailoring of the solution to the perceived source of the "problem." It would require CLECs to file tariff changes that mirror the rate of the Bell Operating Company ("BOC") in the state if it enters into (or has entered into) an access revenue-sharing arrangement.[14] This trigger is appropriate because it addresses the source of the issue -- the use of revenue-sharing arrangements to attract toll traffic (and increased terminating minutes) subject to access charges -- without upending widespread industry practices by finding those arrangements unlawful. Verizon calls the Commission's focus on revenue-sharing arrangements a "reasonable approach."[15] The IUB views the trigger as stricter than the response it adopted to access stimulation concerns.[16] The result achieved by the proposal is reasonable because it eliminates the rural exemption for a CLEC that has entered into a revenue-sharing arrangement. There is no justification for not only removing the exemption for a rural CLEC but also forcing it to charge lower rates than non-rural CLECs and the Bell Operating Companies charge.

The Commission's proposal will be easy to administer because it involves a one-time tariff change and does not impose additional reporting or other certification requirements. Further, the tariff amendment mechanism would create a strong legal and economic incentive for CLECs to comply with the law to ensure they will be paid for the services they provide. It also offers IXCs the information needed to monitor the termination rates they pay.

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14 *NPRM*, ¶¶ 659, 665.

15 Verizon Comments, at 41.

16 IUB Comments, at 14-15.

However, despite its ease of implementation and the balance it strikes between the interests of the IXCs and CLEC, a number of commenters urge additional, unworkable and burdensome provisions. AT&T[17] and CenturyLink[18] suggest the adoption of a threshold number of average minutes per access line as a trigger. OmniTel and Tekstar submit that adopting a minutes-based test would be arbitrary.[19] Further, the number of minutes selected is not supported by the evidence, as OmniTel and Tekstar have explained several times in the record of Docket No. 07-135.[20] OmniTel and Tekstar believe that if such a trigger were adopted, it would increase the likelihood of gamesmanship. Accompanying these proposals is a series of burdensome certification requirements that would be imposed on all rural LECs (and possibly all LECs) and consume Commission resources.[21] In contrast, the Commission's proposal eliminates the need for certification requirements and focuses the burden on CLECs that have entered into access revenue-sharing arrangements.

Just as establishing a trigger based on a threshold average number of minutes per access line would be arbitrary and administratively burdensome and likely increase the challenges of enforcement, so too would basing triggers on traffic ratios. As an initial matter, the suggested ratios vary tremendously, from Sprint's 3 to 1[22] ratio to the 50 to 1 ratio proposed by the National Association of State Utility Consumer Advocates ("NASUCA") and the New Jersey

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17 Comments of AT&T, Inc. WC Docket No. 10-90, et al., Apr. 1, 2011, at 19-20. ("AT&T Comments")

18 CenturyLink Comments, at 38.

19 The arbitrariness is reflected in the myriad of different proposals along this line propounded by the carrier-proponents over the past several years in which the proposed average number of minutes has varied widely and overall continues to be ratcheted down.

20 *See e.g.*, *Ex Parte* filing of Tekstar, Oct. 28, 2010, *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, Declaratory Ruling and Order, WC Docket No. 07-135 (rel. June 28, 2007).

21 *See e.g.*, Level 3 Comments, at 4.

22 Sprint Comments, at 2.

Division of Rate Counsel ("Rate Counsel").[23] The Commission should decline these invitations to adopt a traffic ratio-based threshold for a number of reasons.

As an initial matter, the wide spread in the range of ratios reinforces the arbitrary nature of those thresholds. The advocates of ratio-based approaches do not offer any evidence that shows their proposed ratio reflects traffic that is driven by an access revenue-sharing arrangement. If those thresholds were adopted, they may capture other toll traffic. This would lead to a windfall cost reduction to the IXCs who will seek the lower rates on traffic above the threshold regardless of whether the traffic is subject to an access revenue-sharing arrangement. This will lead to more billing-related litigation as parties dispute and defend the nature of specific traffic. Even the higher threshold proposed by NASUCA/Rate Counsel will lead to gamesmanship and allow parties to stimulate their access traffic by up to 49-fold increase. Such increases will continue to be challenged by IXCs, and the cycle of disputes and litigation will continue. The reality is that these proposals are arbitrary and fail to take into account the underlying problem the Commission is trying to resolve, which is the use of access revenue-sharing arrangements to drive traffic. The use of ratios to establish a trigger should be rejected.

The Commission should also reject any requirements like those suggested by Level 3 for CLECs to "file a declaration with the Commission attesting" to the revenue-sharing arrangement.[24] Such a requirement would be duplicative since the CLEC, under the Commission's proposal, already would have to file a tariff to reflect the new rates. It is unclear what benefit would be gained by filing this attestation (or even where it would be filed on the Commission's website). Since the tariff sets out the terms and conditions for the termination of

[23] Comments of NASUCA and Rate Counsel, WC Docket No. 10-90, et al., Apr. 1, 2011, at 10.

[24] Level 3 Comments, at 4.

traffic involved with an access revenue-sharing arrangement, it provides to the industry, and especially the IXCs, the appropriate notice regarding the rate for such traffic. An attestation offers no additional information.[25]

In proposing different triggers for identifying traffic subject to access revenue-sharing arrangements, advocates of such approaches eschew the relevance and administrative simplicity of the Commission's proposal. Basing the trigger on a predetermined average number of minutes per access line or a traffic ratio may ensnare classes of traffic not subject to an access revenue arrangement and increase the chances IXCs will dispute bills of LECs that may not have entered into revenue-sharing arrangements. The Commission should avoid adopting policies that would lead to such results.

V. IXC CHALLENGES TO THE COMMISSION'S PROPOSED BENCHMARK RATE DO NOT OFFER SUPPORTABLE RATIONALES

After reaffirming that the disputed traffic is interstate traffic subject to compensation and establishing a trigger to identify it, the Commission, in its proposal, shifts its analysis to the appropriate rate that the CLEC can charge. OmniTel and Tekstar agree with many commenters that it is reasonable for the Commission to set the CLEC interstate switched access rate at the rate charged by the BOC or, if no BOC is present, by the largest incumbent LEC serving the state where the CLEC is terminating the traffic.[26] Verizon states, "Requiring CLECs to benchmark to

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[25] Further, the failure of a CLEC to file a modified tariff when required would create a sufficient basis for the Commission to take any enforcement action necessary and appropriate. The suggested certification requirement would not shore up any deficiencies with the Commission's proposal.

[26] OmniTel and Tekstar note that the Commission already has established rules and orders mandating that a LEC may not charge for functionalities that it is not actually providing. (47 C.F.R. § 61.26) The Commission, thus, does not need to adopt additional requirements in this regard.

the state-specific RBOC access rate when they engage in revenue sharing is also reasonable".[27] CenturyLink agrees, saying, " . . . the BOC rate provides a reasonable benchmark for a CLEC's tariffed switched access rate . . .."[28] The IUB,[29] the Public Utilities Commission of Ohio ("OH PUC"),[30] and USTelecom[31] also agree that benchmarking to the BOC rates is a reasonable and appropriate solution.

Despite strong industry support for using the BOC or largest incumbent LEC interstate access rate as a continuation of the Commission's policy to require CLECs to benchmark their rates to the rate of the BOC or largest ILEC in the state, a number of parties argue for lower rates. These arguments must be rejected. CTIA argues for a cap of $0.0007 per minute of traffic,[32] equal to the reciprocal compensation rate for ISP-bound traffic. Following with its theme that traffic subject to access sharing agreements is not interstate traffic, Sprint contends that a better rate would be an even lower rate, $0.0005.[33] AT&T calls the Commission's proposed benchmark rate "excessive,"[34] without explaining why, but also as an "improvement." AT&T contends that negotiations between IXCs and LECs should establish rates without explaining what backstop exists if negotiations fail. The Commission should reject these arguments and stay the course with its proposal.

In making their arguments, these IXCs are attempting to use this proceeding to alter the overall intercarrier compensation regime for CLECs, rather than focus on the direct issues raised

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27 Verizon Comments, at 41.

28 CenturyLink Comments, at 39.

29 IUB Comments, at 17-18.

30 Comments of the OH PUC, WC Docket No. 10-90, et al., Mar. 31, 2011, at 15.

31 USTelecom Comments, at 11.

32 Comments of CTIA, WC Docket No. 10-90, et al., Apr. 1, 2011, at 6-7.

33 Sprint Comments, at 2.

34 AT&T Comments, at 17.

by access stimulation. In addition, they are seeking to establish a preferential rate they could not obtain through fair market negotiations. Any result that pushes rural CLEC rates below the rate applicable to most non-rural CLECs would not be appropriate in this proceeding – which is, in the end, about the applicability of the rural-CLEC exemption in Section 61.26 of the rules[35] to the access services provided by CLECs that enter into revenue sharing arrangements – and should be addressed, if at all, in the broader intercarrier compensation dockets. By eliminating the option for such rural CLECs to continue to enjoy the exemption, the Commission's proposal would squarely address the immediate concerns of the industry.

Commenters suggesting a rate below the interstate access rate are advocating for the creation of a sub-category of CLEC traffic. That would be inappropriate as a transitional measure. Singling out one form of toll traffic for special treatment would be incongruous as a policy matter at the same time the Commission is trying to simplify the intercarrier compensation regime to treat all minutes similarly. The Commission should not burden it with new categories or rates. The Commission's proposal is more consistent with the effort to treat similar traffic in a unified fashion.

OmniTel and Tekstar contend that if the Commission took the unsupported path and forced certain rural CLECs to adopt access rates equal to reciprocal compensation rates, or below, it would disadvantage those rural CLECs relative to others who operate in non-rural markets. In addition, the IXC-proposed $.0007 rate applies to the termination of locally dialed ISP-bound traffic and has become the standard rate for such traffic(not toll traffic) only if the ILEC agrees to extend that rate to all the traffic it terminates in a mutual LEC-to-LEC traffic exchange. Those rates have never been found to be "just and reasonable" for the provision of

[35] 47 C.F.R. § 61.26.

exchange access to an IXC by a LEC, nor does the record in this proceeding support that finding. In addition, there has been no determination or support that those rates cover costs in relation to the services provided even in the context in which they apply. The Commission is correct to avoid these challenges by proposing an established switched access benchmark applicable to non-rural CLECs.

VI. REVENUE-SHARING IS LAWFUL

Numerous parties concur with OmniTel and Tekstar that revenue-sharing should not be found unlawful *per se*.[36] Those parties recognize that such conduct is a long standing practice in the telecommunications industry and that it can take a number of forms.[37] The Commission's proposal appropriately declines to conclude that revenue-sharing is illegal by advocating a reasonable trigger that adjusts the access charge rate to account for the anticipated volume increases when a LEC enters into such arrangements.

One party, CenturyLink, advances the argument that "artificially pumped" traffic through revenue-sharing arrangements amounts to an unlawful cross-subsidization under Section 254(k).[38] No other party contends that revenue sharing arrangements amount to a Section 254(k) violation. As OmniTel and Tekstar point out in their comments, Section 254(k) prohibits a telecommunications carrier from using revenues from the subscribers of its regulated services to subsidize its non-regulated services.[39] It is worth reiterating that the statute and its implementing rules were "designed to inhibit carriers with market power in regulated service markets from

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36 *See e.g.*, Comments of Paetec Holding Corp., MPower Communications Corp., and U.S. Telepacific Corp., and RCN Telecom Services, LLC, WC Docket No. 10-90, et al., Apr. 1, 2011, at 26.

37 *Id.*, at 26-28.

38 CenturyLink Comments, at 36. 47 U.S.C. § 254(k).

39 OmniTel/Tekstar Comments, at 31-33.

imposing the costs and risks of unregulated ventures on subscribers to regulated interstate services."[40] CenturyLink arguments are flawed from the outset because the arrangements under discussion are between CLECs and unaffiliated third parties. No potential exists in such scenarios for cross-subsidization that falls within the purview of Section 254(k). Moreover, as pointed out in their comments, OmniTel and Tekstar, and apparently CenturyLink, have been unable to find any cases where Section 254(k) has been applied to two unaffiliated entities. There is no basis for the Commission to pursue CenturyLink's arguments with respect to Section 254(k).

VII. AT&T'S CHALLENGE OF A 201(b) VIOLATION ARE HOLLOW

The Commission should also reject arguments by AT&T to declare that any "LEC access revenue sharing arrangement in which the LEC becomes a net payor of revenues to a customer" is prohibited under section 201(b) of the Act.[41] AT&T makes this argument without providing or showing any evidence that such payments would harm an IXC if the rate is within reasonable limits as established by the Commission. AT&T offers no explanation as to how or why revenue sharing of revenues generated by reasonable rates is unreasonable or unjust. A claim of Section 201(b) violation falls particularly flat where the revenues are generated where the IXCs and LECs have reached market based arrangements, which is and has been the case with virtually all of the revenues OmniTel and Tekstar have received for the past several years. In such instances, each carrier has had an opportunity to consider its business objectives and reach a mutually beneficial agreement. The Commission should reject AT&T's hollow attempts to ban revenue sharing under section 201(b).

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[40] *Cross-Subsidy Prohibition*, Order, 6 CR 1428, ¶ 6 (FCC May, 1997).

[41] AT&T Comments, at 13.

VII. CONCLUSION

The Commission has put forth a reasonable and simple-to-administer solution to the issues raised by access stimulation by rural CLECs. While OmniTel and Tekstar believe that the marketplace has driven solutions to carrier disputes over so-called stimulated traffic, they support the Commission's proposal because it removes any remaining uncertainty regarding IXCs that continue to refuse to pay and provides a reasonable floor for CLEC access charge rates consistent with other existing regulations. Adoption of the Commission proposal would make clear the obligations of CLECs to modify their tariffs to the lower benchmarked rates and the obligations of IXCs to pay CLECs for their switched access services associated with toll traffic once they have done so. OmniTel and Tekstar support the Commission proposal.

Respectfully submitted,

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